

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL FURNARI and BEVERLY
FURNARI,

UNPUBLISHED
March 16, 2006

Plaintiffs/Counter-Defendants-
Appellants,

v

No. 264864
Oakland Circuit Court
LC No. 2003-051024-CH

WELLS FARGO BANK N.A.,

Defendant/Counter-Plaintiff/Cross-
Plaintiff-Appellee,

and

HUNTINGTON NATIONAL BANK, SCOTT,
ASHLEY, and DIANE M. CAMPBELL,

Defendants/Cross-Defendants-
Appellees.

Before: Davis, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting defendants' joint motions for summary disposition pursuant to MCR 2.116(C)(10) and denying plaintiffs' cross-motion for summary disposition. The case arose out of plaintiffs' agreement with Scott Ashley and Diane M. Campbell (Ashley and Campbell) to sell plaintiffs' home for \$5.5 million to Ashley and Campbell. \$3.5 million was to be financed by mortgages obtained from defendants Wells Fargo Bank (Wells Fargo) and Huntington National Bank (Huntington). At closing, Ashley and Campbell proved unable to afford the remaining \$2 million themselves. To preserve the sale, plaintiffs credited Ashley and Campbell for approximately \$1.2 million, apparently pursuant to a "side deal," and obtained a mortgage from Ashley and Campbell for the remaining \$896,424.10 (the Furnari Mortgage). The mortgage states that it is subordinate to defendants' mortgages, but it was made before the other mortgages and recorded before the other mortgages. Ashley and Campbell eventually defaulted on all of the mortgages. Wells Fargo sought to foreclose its mortgage, and plaintiffs commenced this action seeking to establish the priority of their mortgage over the subsequently recorded mortgages of the banks. The trial court held plaintiffs' mortgage to be subordinate to both banks' mortgages, and this appeal followed. All other claims

between the parties having been disposed of by stipulation or by default, the only issue on appeal is the priority of plaintiffs' mortgage.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id.*, 120. This Court likewise reviews de novo questions of statutory construction, with the fundamental goal of giving effect to the intent of the Legislature. *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175 (2003). This Court also reviews de novo as a question of law the proper interpretation of a contract. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

Plaintiffs seek to take advantage of the protection granted by Michigan's recording priority statute, MCL 565.29. "The clear import of these statutes, described as 'race-notice' statutes, is that the first instrument concerning real estate to be recorded takes priority over later-recorded instruments of whatever sort." *Graves v American Acceptance Mortgage Corp*, 467 Mich 308, 312; 652 NW2d 221 (2002). The stamps from the Register of Deeds show that the Furnari Mortgage was recorded before the other mortgages. Ostensibly, the Furnari Mortgage therefore has priority over the other mortgages.

However, actual knowledge of another mortgage "destroys the preference which the second mortgagee would otherwise be entitled to claim" over prior unrecorded mortgages, because actual notice "is equivalent to filing within the provisions of this statute." *Read v Horner*, 90 Mich 152, 157; 51 NW 207 (1892). *Read* referred to a predecessor statute governing recordation of chattel mortgages, but a more recent case stated essentially the same rule: actual knowledge of another unrecorded mortgage serves as the equivalent of the other mortgage having been recorded first. *Matosh v Metropolitan Trust Co*, 262 Mich 201, 202-203; 247 NW 156 (1933). More recently still, this Court again reiterated the rule that actual knowledge of another mortgage precludes availment of the race-notice rule. *Michigan Nat'l Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992).

Plaintiff Michael Furnari testified that he was actually aware of the financing arrangement under which Ashley and Campbell obtained the mortgages from the banks. Most significantly, the Furnari Mortgage itself states: "This Mortgage is subject to a mortgage given by the Mortgagor to Wells Fargo Bank in the principal amount of \$3,000,000.00 and Huntington Bank for \$500,000.00." We need not consider whether this language *per se* has the legal effect of rendering the Furnari Mortgage subordinate. The presence of that language necessarily proves actual awareness at the time it was drafted. The Furnari Mortgage was drafted by plaintiffs' attorney, so if any ambiguity existed it would be held against plaintiffs. *Patterson v Miller*, 249 Mich 89, 94-96; 227 NW 674 (1929). Because plaintiffs were actually aware of the other mortgages when they made the Furnari Mortgage, they cannot avail themselves of the protection afforded under MCL 565.29, even though they recorded first.

Plaintiff argues that Wells Fargo was, in turn, actually aware of the Furnari Mortgage. In support, plaintiff provides a facsimile transmitted by Wells Fargo's agent stating in part "Seller

todo [sic] 1,4,000,000 [sic] carryback.” This does not refer to a mortgage, or any other subordinating interest, and we are unable to construe it as such. Plaintiff also notes that Wells Fargo’s agent witnessed the execution of the Furnari Mortgage. However, she witnessed the execution of a document stating on its face that it was cognizant of and subordinate to the Wells Fargo Mortgage and the Huntington Mortgage. Therefore, Wells Fargo could not have been aware of the existence of a purportedly prior mortgage.

We need not reach the other issues raised on appeal, because plaintiffs’ actual awareness of the banks’ mortgages is dispositive and renders the Furnari Mortgage subordinate.

Affirmed.

/s/ Alton T. Davis
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot